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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-331

ELMER E. MILLS,

Petitioner,

vs.

THE ELECTRIC AUTO-LITE COMPANY,
MERGENTHALER LINOTYPE CO.
and AMERICAN MANUFACTURING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE ELECTRIC AUTO-LITE COMPANY, MERGENTHALER LINOTYPE CO. and AMERICAN MANUFACTURING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 7, 1977, which reversed a judgment of the district court awarding damages and pre-judgment interest of about $2 million.

Note: Emphasis is ours throughout petition unless otherwise stated. Abbreviations used are: PX (plaintiffs' exhibit); DX (defendants' exhibit); Tr. (trial transcript); App. (separate Appendix hereto).

OPINIONS BELOW

The opinion of the court of appeals (the "court below") is reported at 552 F.2d 1239 and is reproduced in Appendix A, pp.1a-21a. The Memorandum Opinion and Order of the district court is unreported and is reproduced in Appendix C, pp.23a-79a.

JURISDICTION

The court of appeals entered judgment on April 7, 1977 and denied a timely petition for rehearing on June 3, 1977. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. For purposes of determining damages from an unlawful merger, under *Mills v. Electric Autolite* and *Affiliated Ute Citizens v. U. S.*, is the fairness of the merger to be determined solely and conclusively by stock market quotations immediately before and after the transaction, especially when the defendant was in control of the terms and timing of the transaction?

2. Whether under §28 of the Securities Exchange Act of 1934, damages for a buyer's violation of the Act are the amount of the defendant's profit, as this Court held in *Affiliated Ute Citizens*?

3. Whether reimbursement of litigating expenses reasonably incurred on behalf of a corporation unlawfully merged out of existence may be ordered from the successor corporation, after this Court has finally adjudicated that the plaintiff corporation is entitled to whatever relief may be appropriate?

STATUTES & RULES INVOLVED

Relevant here, and set forth in Appendix D, p.80a, are §§14(a) and 28(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78n(a) and 78bb(a) and Rule 14a-9(a) promulgated by the Securities & Exchange Commission (the "SEC") under §14(a) of the Act.

STATEMENT OF THE CASE

This case poses squarely an important question of federal law not definitively decided by this Court: how shall damages be determined as the result of a merger or acquisition made in violation of § 14(a) of the Securities Exchange Act of 1934 (the "Act").

In 1970 this Court unanimously reversed the court of appeals and affirmed the district court's finding that defendants, Mergenthaler Linotype Company ("Mergenthaler") and American Manufacturing Co. Inc. ("American"), violated §14(a) of the Act by issuing a false and misleading proxy statement in connection with the 1963 merger between the Electric Autolite Company ("Autolite") and its parent corporation, Mergenthaler, renamed "Eltra." *Mills v. The Electric Autolite Co.*, 396 U.S. 375. It remanded for determination of what relief, if any, was appropriate. The Court noted that the merger could be set aside "if a court of equity concludes, from all the circumstances, that it would be equitable to do so * * *" and that "Monetary relief will, of course, also be a possibility." *Id.* at 388. The Court continued with this key language (*Id.* at 388-9):

"*** where, as here, the misleading aspect of the solicitation did not relate to terms of the merger,[1] monetary relief might be afforded to the

[1] Although defendants' liability was previously adjudicated on summary judgment by this Court solely on the basis of defendants' "failure to reveal a serious conflict of interest"(*Id.* at 384, n.6), and there was no need on remand for plaintiffs to establish liability on the basis of other misleading statements or omissions, the trial did reveal that the proxy statement contained numerous materially false and misleading statements which did "relate to terms of the merger." For example, the proxy statement asserts that "no consideration is currently being given to any material . . . disposition" of Autolite property (PX 1, p.29) when in fact in the months just before and after the merger defendants were attempting to sell the Hiller Aircraft division (App.53a; Tr.6214), a sale that was consummated 10 months after the merger at book value of $18 million. Hiller was the only Autolite division incurring losses and its impending or proposed sale, if disclosed, would have told the public that Autolite's earnings would have increased immediately by about 20% by the elimination of the losses and further by reinvestment of the substantial sale proceeds.

The proxy statement recites that the actual merger ratio of 1.88 Eltra preferred for each share of Autolite "was arrived at after careful study of all relevant factors, including market value of shares, sales, earnings and dividend histories, general financial condition and immediate and long-range prospects . . . ." (PX 1, p.3) and implies that a period of three to five years was considered (*id.* at 13-16) when in fact the 1.88 ratio was determined only on the basis of earnings for a six-month period just prior to the merger (Tr.2404-5; App.47a), which defendants carefully selected to take advantage of their *cestui*, *infra*, pp.13-21.

The proxy statement does not show any comparison of the earnings for "stub years"—i.e., three months ending March, 1962 and 1963. All prior proxy statements or prospectuses issued by Autolite or Mergenthaler, in evidence in this case, show that it was standard practice to make stub year comparisons. PX 100, p.16; PX 82, p.18; and PX 99, p.6. Defendants' accounting expert said so (Tr. 4664; see also DX 88, pp. 7 and 9). A *draft* of the proxy statement issued in this case contained a comparison for the stub year March 31, 1963-1962 (PX 98, page C). By omitting the comparison defendants concealed that the net earnings for Autolite for the three months ended March 31, 1963 were up about 30% over the comparable period in 1962, ($1,215,000 vs. $941,000) and that the upward trend in Autolite's earnings from 1961 to 1962 was continuing markedly in 1963.

(Footnote continued on following page)

shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, damages should be recoverable only to the extent that they can be shown. If commingling of the assets and operations of the merged companies makes it impossible to establish direct injury from the merger, relief might be predicated on a determination of the fairness of the terms of the merger at the time it was approved. These questions, of course, are for decision in the first instance by the District Court on remand, and our singling out of some of the possibilities is not intended to exclude others."

This Court also held that plaintiffs were entitled to immediate reimbursement of their reasonable attorneys' fees and expenses incurred in establishing the violation of the Act irrespective of whether future relief should be granted. *Id.* at 389-397. The Court left open and up to the district court after trial whether plaintiffs could recover attorneys' fees and expenses incurred in further litigation on the question of relief, *id.* at 390, n.13; and concluded that "whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made." *Id.* at 396.

On remand, plaintiffs sought rescission and damages based on the two specific theories mentioned by this

[1] *continued*

In their letter to the Autolite stockholders initially announcing the merger terms defendants stated that Autolite had submitted the plan to a "prominent firm of independent consultants" (Standard Research Consultants—"SRC") who deemed it fair "after recommending certain amendments to the plan" (PX 58), thus leaving the false impression, not cured by the proxy statement (PX 1, p. 3), that SRC had succeeded in improving the plan for Autolite. In fact SRC made no recommendations and accepted every plan exactly as submitted by defendants (DX's 45A-D).

Some of these and other glaring misstatements and omissions going to the terms of the merger are discussed *infra* at pp. 14, 16-18.

Court: unfairness of the merger when consummated and post-merger earnings. On April 11, 1975, following a three-month trial that ended in February 1974, the district court found and concluded as follows:

1. It adhered to its earlier 1972 ruling denying rescission, CCH Fed. Sec. L. Rep. ¶ 93,354 (N.D.Ill. 1972), in part because of "the professed deterrent effects of the liberal damage theory which has developed under §28(a) of the . . . Act. . . ." App.39a.

2. It correctly stated the rule as to the measure of damages, viz., that plaintiffs, even if the merger terms were fair, could still recover "the actual profit received by the injuring party as a direct result of the transaction—even though the potential for such profit was totally unforeseeable at the time of the merger". App.44a, 45a. Citing *J. I. Case Co. v. Borak*, 377 U.S. at 433-5 and *Mills*, 396 U.S. at 386, the court noted that this "variety in approach" to recovery under §28 of the Act has been and is justified in part on "the need for effective private enforcement of the federal securities laws" (App.44a), but concluded erroneously not to utilize this measure of damages. App.56a-57a.

3. It concluded that the merger was unfair and that plaintiffs were entitled to damages of $1,233,918.35 plus pre-judgment interest of about $740,000. This result was "based upon all of the relevant evidence" (App.70a) and what the court considered to be an "equitable award". App.71a. The court noted that *"both sides agreed"* that in assessing merger fairness the court "*must* consider the following quantitative factors. . . . : (1) market value; (2) earnings; (3) book value; and (4) dividends" as well as "certain qualitative factors". App.42a. "These [quantitative] factors have long been considered relevant by courts faced with the task of gauging the value of a business * * * [citations omitted] And in considering these factors, it has been customary to review at least a

five-year period for the purposes of comparison." *Ibid.* The court also considered the merger terms in light of the "future prospects or 'earnings potential' of each company as they may have been reliably projected at the time of the merger". App.43a.

The district court also found that in assessing the fairness of *this* merger: (1) book value should play a "*significant* role" (App.49a); (2) earnings were an "important factor" (App.48a); but that (3) market values "cannot play an important role" (App.47a).

4. It held that plaintiffs' attorneys' fees and expenses, including those for establishing liability, were to be paid out of the judgment for damages. App.71a-73a.

The court of appeals erroneously held that this Court's mandate laid down only a single test for damages—whether the merger terms were fair at the time of the transaction. App.1a,6a-9a. It held that even though plaintiffs suffered a reduction in their earnings as a direct result of the merger and that defendants had profited thereby, still there could be no recoverable damages if the merger were fair. The court below then concluded that the sole test of fairness was the listed stock market prices for a few months before and one month after the merger. App.14a-19a. On this basis it deemed the merger was fair as a matter of law. It overruled the district court's findings that market prices were unreliable and ignored the district court's findings that book value and earnings were "significant" and "important" in this merger. The court of appeals cited no precedent [there is none] to support its holding that (1) short-term listed market prices are the exclusive test of merger fairness and (2) that defendants may retain their post-merger unjust enrichment or profits if the illegal merger was fair.

The court of appeals recognized that the merger was unfair on the basis of the post-merger earnings ratio which it found was 4.85 (App.8a), or more than double what it considered was the "actual effective exchange ratio of 2.31" (App.8a,5a), but considered post-merger earnings only as evidence of unfairness and not as an independent basis for recovery (App.6a-7a). Relying on (1) its erroneous conclusion that the merger was fair based solely on market prices and (2) an alleged but *non-existent* "finding" of the district court that there was a commingling of the assets and operations, the court of appeals refused to recognize, what its own opinion shows, that as a result of the merger plaintiffs had suffered a reduction in their earnings and defendants had profited or been unjustly enriched by *at least $7,146,856, infra*, pp.25-6.

Finally, the court of appeals' pre-emptive holding that as a matter of law plaintiffs could not recover attorneys' fees and expenses for the time subsequent to the mandate of this Court, disobeys that mandate which provided that the district court, in its discretion, could decide whether a "further award should later be made" after considering whether relief was secured.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW THAT MARKET PRICE IS THE EXCLUSIVE MEASURE OF FAIRNESS AND DAMAGES IS CONTRARY TO THE PRIOR MANDATE OF THIS COURT, IN CONFLICT WITH OTHER DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS AND THE SECURITIES & EXCHANGE COMMISSION, AND CONTRARY TO REALITY.

In reversing the district court's judgment that the merger was unfair, the court below held as a matter of law that market price for a few months is the sole determinant of the fairness of a merger between dominating and subsidiary listed companies and that all other standard criteria for merger evaluation, including actual

and prospective earnings and book value, are irrelevant (App.16a-17a).[1]

This holding is in direct conflict with this Court's prior opinion which directed the lower courts to "consider the same factors that would govern the relief granted for any similar illegality or fraud" and "exercise 'the sound discretion which guides the determinations of courts of equity.'" *Mills*, 396 U.S. at 386.

In any challenged parent-subsidiary merger, or transaction between fiduciaries and their *cestui*, the courts of equity are required to determine the fairness of the transaction by considering whether "under all the circumstances" it "carries the earmarks of an arms' length bargain." *Pepper v. Litton*, 308 U.S. 295, 306-7 (1939). See also *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-8 (1919).

The court below abandoned this legal standard and its duty and erroneously substituted the so-called judgment of the market place. And it did so in the face of the unchallenged and undisturbed finding of the district court that arms' length bargainers would have placed significant weight on book value and important weight on earnings in determining the fairness of this merger. Thus even if, *arguendo*, market prices were reliable, arms' length bargainers would not have placed exclusive weight on them.

The court below departed from its own long-standing decisions, which adhered to *Pepper v. Litton*, and which held that in a minority squeeze-out transaction all elements of value that arms' length bargainers would

[1] The opinion below is inherently illogical. It does not follow that because market price may, in an appropriate case, be the "primary gauge" of a company's worth, that it must be the *exclusive* gauge (App. 16a). Moreover, the mechanical rule now announced is well calculated to emasculate the federal securities laws by assuring that no private actions will be brought upon transactions involving listed securities. No defendant would be foolish enough to make the futile offer of less than can be obtained on the market.

consider—earnings, book value, dividends, future profits, and market value—must be taken into account in determining the fairness of the transaction. *Lebold v. Inland S.S. Co.*, 82 F.2d 351, 356 (CA 7, 1936), 125 F.2d 369, 374 (1942). In *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (CA 7, 1972) the Seventh Circuit, per Mr. Justice (then Judge) Stevens, expressly disclaimed any implication "that market values are a better determinant of exchange ratios than expert appraisals." (*Id.* at 28). Market price alone might be considered in assessing fairness and damages *only* if arms' length bargaining between fully informed representatives would have produced a merger ratio predicated on market values. *Id.* at 27-8.

Like a chancellor, the SEC stands as protector against unfair and overreaching mergers under §17 of the Investment Company Act of 1940, 15 U.S.C. §80a-17. In *Talley Industries, Inc.*, SEC Investment Company Act Release No. 5953 [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 77,774 (1970), the SEC was required to pass upon the fairness of a proposed merger of two industrial companies, both of whose stock was "actively traded on the New York Stock Exchange." *Id.* at p.83,-790. The SEC considered in detail the past and projected earnings and asset contributions of both companies over long periods, dividends, the nature of the businesses and market prices. Regarding the latter, the SEC said (*Id.*at p.83,792):

> "Moreover, while we have taken market prices into consideration as one element in assessing fairness, they are not entitled to be given controlling weight in the discharge of our responsibility to determine the question of fairness under Section 17 of the Act, especially where, as here, the comparison involves companies one of which is controlled by the other."

Thus, the opinion below is in direct conflict with the SEC's long-standing expertise and judgment as to the measure of fairness of a merger of two industrial, actively traded, companies and would require the courts to overturn SEC determinations as to fairness if based on anything but stock prices where an active market exists.

The decision below also conflicts with this Court's recent affirmance of the SEC's holding that in a merger between an industrial concern and an investment company the market price of the latter is not controlling in determining merger fairness. *E. I. DuPont de Nemours & Co. v. Collins*, ... U.S. ....., 53 L.Ed. 2d 100 (1977).

In *Schwabacher v. United States*, 334 U.S. 182 (1948) this Court reiterated the need to consider all relevant factors and reversed a finding by the Interstate Commerce Commission ("ICC") that a railroad merger was "just and reasonable." The Court noted that the ICC had duly considered book value, historical earnings, future prospects and market prices (*Id.*at 188 and 200) and that the market value of the plaintiffs' stock ranged from $87 to $99 while the stock proposed to be exchanged would have ranged from $90 to $111 (*Id.* at 185) [and hence fair under the opinion below], but held that the ICC failed to consider whether plaintiffs' stock had a greater "intrinsic" value under state law due to dividend arrearages not reflected in market prices. While the ICC had a statutory duty to protect the minority in the absence of arms' length bargaining (*Id.* at 201), the duty of a chancellor is no less. Here it is particularly the "duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose," *Borak*, 377 U.S. 433, of preventing "management or others from obtaining authorization for corporate action by . . . deceptive or inadequate . . . proxy solicitation." (*Id.* at 431).

Instead of a damage rule that will serve "as a most effective weapon in the enforcement of the proxy requirements," *Borak*, 377 U.S. at 432, the ruling below sanctions deceptive proxy statements, however outrageous, and immunizes their solicitors, provided only that the wrongdoers who control the terms and timing of the transaction make the price superficially appear to be fair by market price comparisons for a few months prior to the transaction.

The decision below was not well considered.[1] It overlooks the well-recognized fact that the parent's control has a *per se* adverse effect on the subsidiary's market price.[2] After noting "the shadow cast by the

[1] The exclusive market price test was not suggested or argued below. Instead defendants stated correctly that all of the standard factors must be considered in evaluating a merger. (Def.Br.33; App. 42a). The court below thus overlooked numerous cases and authorities holding that in determining merger fairness *all* relevant factors *must* be considered even where there is a reliable market price. *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch.20, 89 A.2d 862, *aff'd.* 33 Del. Ch.293, 93 A.2d 107 (Del.Sup.Ct.1952); *Levin v. Great Western Sugar Co.*, 406 F.2d 1112 (CA 3, 1969), *cert. den.*, 396 U.S. 848; *de Haas v. Empire Petroleum Co.*, 300 F.Supp. 834 (D.Col.1969), *aff'd in part and rev'd in part*, 435 F.2d 1223 (CA 10, 1971). See also Brudney and Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 Harv. L.Rev. 297 (1974) (hereafter cited *"Fair Shares"*) at p. 311, n.37 ("...market prices are almost uniformly found inadequate to measure...the contributions of the parties to the merger...."); 15 Fletcher Cyc. Corp. (1973), § 7160, p. 256; *Clarke v. Gold Dust Corp.*, 106 F.2d 598, 603 (CA 3, 1939), *cert. den.* 309 U.S. 671; and J. Bonbright, *The Valuation of Property* (1937 Ed., 1965 Reprint), p. 811 (the "verdict of the market place must give way to the verdict of a fair-minded and intelligent appraiser") (hereafter "Bonbright").

[2] The district court's conclusion that market prices were "unreliable indicators" of value and "cannot play an important role in determining the fairness" of *this* merger was based on the testimony of Professor Nemmers (App. 46a-47a). Professor Nemmers concluded that market prices after 1960 were unreliable for three basic reasons: (1) Mergenthaler's control over Autolite; (2) Autolite's massive switches in investments under defendants' control, which temporarily reduced its

(Footnote continued on following page)

overhang of the parent's control on the current market value of the subsidiary's shares," *Fair Shares, supra*, an article heavily relied upon by both courts below, continues at p. 306:

> *"The resultant depressed price* may be...a function of the likelihood of exploitation such as an unfair merger.... In any event, any reliance upon market price to measure appraisal value visits upon the subsidiary's public stockholder the cost of the parent's control in determining appropriate compensation."[1]

The holding below is equally oblivious to the fact that the parent may, and did here, control the timing of the merger to take advantage of its *cestui*. Between 1957 and 1960 Mergenthaler acquired 27% of Autolite's stock in the belief *"that Autolite had a value much in excess of the quoted market for its shares"* (PX. 57, pp.2-3). The district court found there was effective control by August 1961. App.29a.

Defendants intended to merge for years prior to 1963; and the market place knew it (PX's 63, 71 and 57, pp.4-5.) A specific plan of merger was considered by defendants in late 1961, but postponed so that Mergenthaler could obtain "the *benefits* accruing to a majority shareholder," which it did by tender offer in March 1962 (PX 88, pp.1-2; PX 57, p.5).

[2] *continued*
earnings which adversely affected its market price (e.g., the sale of assets to Ford, *infra*, p.20-1) and (3) the intercompany stock transactions. The court of appeals, in reversing the district court's finding, took issue only with the effect of the intercompany transactions (App. 12a).

[1] Bonbright reached a similar conclusion 40 years ago (p. 828): "...the fatal objection to market value is that it reflects the influence of the very sale or merger against which the dissenter is seeking a remedy."

Also as observed in *Fair Shares*, p.309, n.33: "...parent-subsidiary mergers are not exercises in altruism...the parent will rarely acquire the subsidiary's assets unless it perceives...a gain from the transaction."

Upon obtaining a 54% interest in and consolidating financial statements with Autolite in 1962, the "benefits" to Mergenthaler as majority stockholder were threefold and amounted to $25.5 million. Mergenthaler (1) included in its income 54% of Autolite's earnings instead of only the dividend income; (2) wrote up its book value from about $25 to $32 a share; and (3) established a "deferred credit" income of approximately $789,000[1] a year for 15 years which would be shown as Mergenthaler income, although non-operating income. The "increase" in Mergenthaler's book value and its deferred credit income were derived solely from the difference in the cost of acquiring Autolite stock and Mergenthaler's 54% interest in the book value of Autolite assets.

This $25.5 million write up in Mergenthaler's book value and income cost it nothing and gave support to Mergenthaler's market price just before the merger. Defendants thus used Autolite's book value not just to their advantage but also to the disadvantage of their *cestui*.[2]

The actual merger ratio of 1.88 was fixed by defendants solely upon earnings over the six-month period beginning October 1962 and ending March 1963 (Tr.2404-5)—the period when Mergenthaler first included in its income the deferred credit and 54% of Autolite's earnings. This weighted the merger ratio in favor of Mergenthaler and it did so in part on the strength of Autolite's book value.

[1] Which was 14% of Mergenthaler's 1962 net income (PX 1, p.7) or about 29 cents a share. This explains the difference in the 1962 earnings ratios at App.9a, n.4. In 1958, 1959 and 1960 the earnings per share ratios of Autolite to Mergenthaler were 4.2, 3.8 and 2.2 (PX 41) or an average of 3.4.

[2] While these facts should have estopped defendants from a merger at less than a minimum book value ratio of 2.74, the court of appeals ignored book value as a matter of law.

Mergenthaler's "majority-benefit" deferred credit "earnings" increase (14%) and book value increase (28%) were first reported publicly in January 1963 (PX's 103, 104) and necessarily had a favorable effect on Mergenthaler's market price during the pre-merger period the court below deemed controlling. App.17a-18a.

One essential but unfounded predicate of the opinion below is that "during the first part of 1963. . .outside investors. . .had access to the full gamut of financial information about both corporations, including earnings and book value" (App.16a). The district court made no such finding and there is no evidence in the record to support this general statement which cannot be the general rule.[1] While the court below relied on *Fair Shares*, it ignored its caveat that (pp.305-6):

> ". . .the timing of the decision to merge may be based on the parent's anticipation of a substantial increase in the subsidiary's earnings. That anticipation may result from data known only to management which is not ripe for disclosures and which in many instances, therefore, will not have been

[1] The history of the market is of recurring scandals that have defrauded or misled those *"outside investors"* who relied on what was *fed* them by insiders. Consider, e.g., Equity Funding or Penn Central, to mention only two of the more recent and largest scandals. As Mr. Justice Douglas reminds us in *Go East Young Man* (Random House, 1974) at p.272: "In the capitalistic system, the unsophisticated small stockholder is [like] the ground squirrel" and the "anchor man in the food chain" for many "predators."

Benjamin Graham, the dean of security and financial analysts whose treatise was relied on by defendants below, commented in 1974 on the "loss of public confidence in the financial community growing out of its own conduct in recent years," observed that Wall Street history from 1968-73 was "little more than a register of the crimes, the follies and the misfortunes of mankind," insisted that "more damage has been done to stock values. . .from inside. . .than from outside Wall Street," and noted that the "abuses in the financial practices of many corporations during the same period paint the same melancholy picture." B. Graham, *The Future of Common Stocks*, Financial Analysts Journal (Sept.-Oct. 1974) pp.20, 30. (Hereafter cited "Graham").

> reflected in the market price of the subsidiary's stock. Hence, judicial emphasis on the market price or on past earnings as the basis of projecting future earnings is likely to result in underestimating the future earnings properly attributable to the old enterprise."

The record here shows that defendants timed the merger to take advantage of critical facts they had which the public did not have. These facts, if revealed, unquestionably would have had a positive impact on Autolite's market price in early 1963. The merger was announced on April 26, 1963, and defendants said that in consummating it two months later "time was of the essence" (DX 68). During January-March 1963 Autolite's stock averaged $52.25 (App.17a). Autolite's 1962 earnings, reported on March 12, 1963 (PX 2), were $2.75 per share. The defendants knew that in January 1963 Autolite was projecting internally and conservatively 1963 earnings of $4,295,000 (Tr.4992) or $3.70 per share. It was *then* that they decided to proceed with the postponed merger. Autolite's actual per share earnings for 1963 were $4.36 (a 59% increase over 1962), which defendants, with knowledge of Autolite's internal income statements, had every reason to expect by June 1963. The public did not know the extent of the anticipated earnings increase. If it had, Autolite's market price would have been much higher than it was prior to the merger.

Revelation in 1963 of the degree of Autolite's successful diversification, in terms of earnings, also would have had a favorable impact on the market price of Autolite. By 1963 Autolite's earliest (1959) diversification outside the automotive business, C & D Batteries ("C & D"), with only 7% of Autolite's sales, was producing 23% of Autolite's pre-tax earnings. C & D's net income before taxes in 1961 and 1962 were $740,000 and $1,290,000, respectively. Its net before taxes for the first half of 1963 was $1,290,000 which equalled *all* of its

1962 income. Its projected pre-tax earnings for the full year 1963 were $1,811,529. None of these facts was disclosed publicly or in the proxy statement. The district court's findings that C & D was quite successful and had an excellent outlook at the time of the merger (App.52a), were based on data the public and minority shareholders did *not* have.[1]

Further, if defendants had not concealed by proxy misstatement the contemplated and soon completed sale of Hiller, the public would have known that Autolite's earnings would have increased immediately and substantially by the elimination of Autolite's only unprofitable division (Hiller losses were then reducing Autolite's earnings by about 20% or 57¢ a share) and further by reinvestment of the $18 million sale proceeds.

As defendants' experts said, the primary determinant of value is "prospects" (Tr.4069) and market price is governed largely by actual and anticipated earnings. Tr.5273-4, 5440. Since the market place[2] did not have

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[1] The district court's findings, not challenged or disturbed on appeal, were that between 1960 and 1963 the nature of Autolite's business had become quite different, that its diversification experienced some success and that its earnings prospect or potential was quite good at the time of the merger (App.46a, 47a, 52a), while Mergenthaler's earnings, divorced from Autolite's, were declining (App.47a). The record also shows that by 1963 Autolite was no longer classifiable as or comparable to an auto parts company and no longer behaved like auto parts companies in terms of market price or cyclicality. (Tr.1848-59, 1874-5, 4350-1, 4409) Its business had been changed materially PX 73, pp.391-6; PX 2, pp.4-17; PX 88.

[2] The market judgment deferred to below (App.16a-17a), and which produced the average price of $52.25, consists of only a few hundred shares a day during the first quarter of 1963 (DX 73-C). In January, February and March trading volume was 7,800, 4,100, and 8,700 shares which amounted to 6/10, 3/10 and 7/10 of 1% of the 1,159,000 outstanding Autolite shares. In *Norte & Co. v. Huffines*, 288 F.Supp. 855, 859 (S.D.N.Y. 1968), aff'd in part and remanded in part on other grounds, 416 F.2d 1189 (CA 2, 1969), the court held that

(Footnote continued on following page)

access to this key information on prospects, earnings and book value in early 1963, the court below's fundamental premise as to the knowledge of the market place (App.16a) is fallacious.

The court below overlooked that the district court's finding that the merger was unfair was based in part on data which defendants concealed from or stated falsely to the public and the minority shareholders but which was exposed at trial. The "recently launched academic theory" of the "efficient market," Graham, pp.22-3, extended with deadly consequences by the court below, does not coincide with "reality" (*Id.* at 23), or legal precedent.

Ironically and wrongfully, proxy statement omissions and misrepresentations or use of inside information, under the ruling below, become the means for avoiding damages. The decision below proves insuperable not only to "effective relief," *Borak*, 377 U.S. at 435, but to *any* relief. It cannot stand if private damage actions are to continue as "a necessary supplement to Commission action." *Id.* at 432.

Also linked to unreality is the court of appeals' determination that market prices for only a few months before the merger and one month after are all that are necessary or permitted to ascertain merger fairness. (App.14a-15a, 17a-19a). Its conclusion that market prices for the period "immediately preceding the merger are the most likely to reflect the actual value of each corporation at the time the merger was consummated" (App.14a) could be reached only by assuming that parental control has no effect on the market price of the

[2] *continued*
monthly trading volume of 1.2% of outstanding shares of a listed stock was too thin to accord significant weight to market price in determining stock value. Instead the court accepted its higher book value after noting that certain assets had been sold substantially over book value (*Id.*), just as was true here only more extensively as noted, *infra*, pp.20-1.

parent or the dominated subsidiary. As shown above, this assumption has no basis in reason or fact. To avoid the effects of control, fundamental fairness and standard merger evaluation would require (*cf. Talley Industries, Inc., supra*, p.10), as the district court found, a five-year comparative period to obtain a more truly representative period for valuation.[1] Defendants' expert, who suggested a five or ten year comparative period, stated that *particularly* as to a company like Autolite

> "a single quarter's earnings or experience does not appropriately reflect any determination for the basis of determining value, so that you cannot, with any degree of reasonableness, base value on experience in a single quarter." (Tr.4406).

A *fortiori* one cannot base fairness on 4¾ months of market prices before and 30 days after the merger, as the court below did to achieve its 2.31 "effective" ratio.

On a five-year basis, but excluding 1961 as defendants thought proper to do,[2] the average market price ratio was 2.8 (PX 37A). This shows the merger's unfairness even accepting *arguendo* the lower court's "effective"

[1] To bolster its "confidence" in 1963 market prices the court below refers to the market price ratios in 1961 and 1962 (App.15a). But both sides agreed that it is improper to compare Autolite's earnings in 1961, its year of "transition" (Tr.2342). The court overlooked that Autolite's 1961 and 1962 earnings were substantially but temporarily reduced, and its market price thereby adversely affected, by the 1961 sale of assets to Ford which *defendants* also timed and controlled. (See *infra*, p.20-1). Although defendants believed this sale would have "long-range" benefits for Autolite, the assets sold represented 16% of its book value and 35% of its pre-tax 1960 earnings. Tr. 1004-14, 1120-2, 1163-4, 2342, 2404, 5273, 5440; PX 41-D, p.2.

[2] Defendants took the position that 1961 was a year of transition and that the only fair basis for comparing earnings was the six-month period ending in March, 1963. See n.1, p. 19, and n.1, p. 4.

ratio of 2.31[1] and its conclusiveness of market prices. For the three years prior to defendants' effective control of Autolite (1958-60), the average market price ratio was 3.0. For all five years prior to the merger it was 2.6. The average ratio of earnings for the three years prior to defendants' control was 3.4. For the five years 1958-62 it was 2.54 and excluding 1961 it was 2.9. All of these per share ratios favored Autolite.[2]

The weakness in resorting to market price as the exclusive test of fairness as a matter of law, is demonstrated also by the importance and application of book value as a matter of fact in this case. The trial judge's finding (App.49a) that "Given the nature of Autolite's substantial liquid asset position . . . book value should play a *significant* role in assessing the fairness of the Eltra merger" is amply supported in the record and was not challenged or disturbed on appeal.

Autolite's 1963 book value of $88.01 a share was at least 2.74 times Mergenthaler's and 3.4 times Mergenthaler's if the latter's 1962 write-up, discussed above, is excluded. Between 1957 and the merger Autolite sold assets (plants, equipment, certain intangibles and inventory and securities), at or substantially above book value, totalling over $57 million. Another $26 million was sold at book value post-merger. Between 1958 and 1961 Autolite had $30 to $50 million cash for diversification. This included $28 million from

[1] The court below held correctly (App.11a, n.6) that it was "circular reasoning [for the district court] to use the market value generated by the actual merger" but then engaged in the same reasoning by finding the merger fair based on an "effective ratio" constructed in part on market prices for one month following the merger (App.5a, 17a). The court overlooked that both sides agreed that post-merger evidence is irrelevant as to the issue of fairness.

[2] The court of appeals determined that the post-merger earnings ratio was 4.85, said this indicated the merger was unfair (App.7a-8a), but gave no effect thereto.

the 1961 sale of certain assets to Ford[1] *at $20 million over book value.*

Just prior to the merger Autolite had about $17,800,000 in cash and marketable securities; and net working capital of $66,507,000, or $57.38 per share (PX 116) which was $5.13 *more* than the $52.25 market price of Autolite deemed controlling by the court below (App.17a).[2]

The crucial significance of book value to defendants was that within 15 months after the merger, Eltra withdrew approximately $23 million in assets from the Autolite divisions. By 1972 the withdrawals exceeded $103 million. The assets remaining in Autolite generated two-thirds of Eltra's net income from 1963-72 (App.7A; PX's 13-22).

The failure to give weight to the unchallenged and undisturbed finding of the district court as to the significance of book value in this case leads the court of appeals not only into error but also into direct conflict with the Second Circuit's specific holding that where, as here, book value is found significant as a fact, the fairness of a merger cannot be predicated on a comparison of stock market values. *Gerstle v. Gamble-Skogmo, Inc.*, 298 F.Supp. 66, 100, 104-5 (E.D.N.Y.1969), *aff'd.*, 478 F.2d 1281, 1289-91, 1310, n.34 (CA 2, 1973).

II. THE HOLDING THAT POST-MERGER PROFITS AND EARNINGS COULD NOT ESTABLISH PLAINTIFFS' DAMAGES IF THE ILLEGAL MERGER WAS FAIR CONFLICTS WITH THE MANDATE AND WITH OTHER DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

The opinion below conflicts with the mandate and decision of this Court on the prior appeal, 396 U.S. 375, 385, in its ruling that no monetary relief can be granted

[1] This Court is otherwise familiar with that illegal sale. *United States v. Ford Motor Co.*, 405 U.S. 562 (1972).

[2] ". . .irrespective of market quotations for the shares. . . . [i]f the business has been prosperous, and is at least reasonably promising for the future, it should be worth its net asset value; * * *." Graham, p.22.

if the merger was fair (by market prices) at the time it was approved, and in denying post-merger "earnings or earnings potential" or other damage "possibilities" authorized in *Mills*. It also conflicts with the following decisions in failing to award monetary relief on the basis of defendants' unjust enrichment and the accounting of defendants' profits from the unlawful merger: *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972); *Janigan v. Taylor*, 344 F.2d 781, 786 (CA 1, 1965), *cert.* denied 382 U.S. 879 (1965): *Gerstle v. Gamble-Skogmo, Inc.*, 298 F.Supp. 66, 99-100 (E.D.N.Y. 1969), *aff'd.*, 478 F.2d 1281, 1304 (CA 2, 1973); *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402, 417 (CA 3, 1974).

The opinion below proceeds upon one explicit premise: that no monetary relief can be awarded if the merger was "fair" at the time of the exchange. App. 1a, 6a-9a. But that measure of damage recovery was mentioned by this Court as just *one* possible basis for monetary relief, to be used only if circumstances should "make it impossible to establish direct injury from the merger," with the explicit direction that "our singling out of some of the possibilities is not intended to exclude others." 396 U.S. 389. The court below thus violated the mandate by excluding from its consideration the award of any monetary relief measured by the defendants' unjust enrichment from the illegal merger.

A defendant who misappropriates property, whether by theft, fraud, breach of fiduciary duty, or violation of statutory command, must disgorge his unlawful gains and must account to the party from whom the property was unlawfully obtained for the profits illegally reaped. This well-established remedy is both ancient and wide-ranging, applicable as the measure of recovery throughout the varied areas of the law.[1]

[1] See, e.g., *Moses v. Macferlin*, 2 Burr. 1005,96 Eng. Rep. 120 (K.B. 1760-Lord Mansfield's opinion); *Callaghan v. Myers*, 128 U.S. 617, 662-67 (1888) (accounting of profits from copyright

(Footnote continued on following page)

This remedy, giving monetary relief in the amount of the defendant's gains and profits from his wrong, has been explicitly declared by this Court to be an integral part of § 28 of the Act, fixing the amount of damages recoverable for a violation:

> "In our view, the correct measure of damages under § 28 . . . is the difference between the fair value of all that the [plaintiff] seller received and the fair value of what he would have received had there been no fraudulent conduct, see *Myzel v. Fields*, 386 F.2d 718, 748 (CA8 1967), cert. denied, 390 U.S. 951 (1968), except for the situation where the defendant received more than the seller's actual loss. In the latter case damages are the amount of the defendant's profit. See *Janigan v. Taylor*, 344 F.2d 781, 786 (CA1, 1965), cert. denied, 382 U.S. 879 (1965)." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972).

The propriety of this remedy in the context of an unlawful merger "requiring respondents to make an accounting of their unlawful gains," was confirmed in *SEC v. National Securities, Inc.*, 393 U.S. 453, 456 (1969).

The court of appeals (App.6a-9a) misapprehends this settled law and builds upon the mistaken premise, repeatedly stated, that the defendants' profits provide no

[1] *continued*
infringement); *United States v. Carter*, 217 U.S. 286 (1910) (accounting for bribes); *Coca-Cola Co. v. Dixie-Cola Laboratories*, 155 F.2d 59 (CA 4, 1946) (profits from unfair competition, despite no actual loss to plaintiff); *Grand Trunk Western Ry. v. Chicago & W.Ry.*, 131 F.2d 215 (CA 7, 1942) (accounting for unjust enrichment); *Fur & Wool Trading Co. v. George I. Fox, Inc.*, 245 N.Y. 215, 156 N.E. 670 (1927) (accounting for profits from theft); *Edwards v. Lee's Adm'n*, 265 Ky. 418, 96 S.W. 2d 1028 (1936) (accounting for profit from use of cave under plaintiff's land). See 5 A. Scott, *Trusts*, § 462.2, p.3418 (1967); A.L.I. *Restatement, Restitution, passim* (1938). Recently the Seventh Circuit implied a private right of action under the Davis-Bacon Act, noting that "the contractor. . . has been unjustly enriched by contracting on the basis of prevailing wage." *McDaniel v. University of Chicago*, 548 F.2d 689, 695 (CA 7, 1977).

more than evidence, viewed in hindsight, which may bear on the sole issue, as it sees it, of whether the exchange was "fair" at the time of the merger. This misconception would overrule, in its sweep, literally thousands of decisions and deny the basic remedy for a wide variety of wrongs. By ignoring one-half of the law of damages under § 28 of the Act as authoritatively interpreted by this Court in *Affiliated Ute Citizens*, and insisting that "Damages must be based on evidence that the Auto-Lite minority shareholders were not paid a fair price," App. 7a, the court below has erased as well, at one fell swoop, the established principles and major heads of Anglo-American jurisprudence: constructive trust, unjust enrichment, money had and received, accounting for profits ensuing upon a wrong, monetary rescission, and restitution. Under *Ute*, quoted above, the defendant's profit is a separate and independent basis of recovery, to be used not to show unfairness, but as the direct remedy when the amount of those profits exceeds the "actual loss" measured by fairness. The opinion below thus stands in direct conflict with *Ute* and with this Court's mandate on the prior appeal, directing the lower courts to consider other possibilities beyond the fairness of the merger at the time.

The opinion below also conflicts directly with other circuits. The faulty reasoning that defendants' profits are merely retrospective evidence of unfairness misleads the court of appeals to the conclusion that if the merger was fair at the time, by other evidence, no damages can be recovered. App.7a. This view "that a defrauded seller may not recover unless he received for his stock a price that was less than its market value at the time that such seller sold it," was expressly rejected as erroneous by the Third Circuit in *Rochez Bros.*, *supra*, 491 F.2d at 417. The decision below on this point also conflicts directly with the Second Circuit's decision in *Gerstle*, *supra*, 478 F.2d 1281, 1304, affirming 298 F.Supp. 66, 99-100, holding that even if the merger were fair in that the

value of the stock plaintiffs gave up was no greater than the value of the stock they received, the plaintiffs were entitled to "the ensuing profits" accruing to defendants after the merger in the amount of $12 million.

A final error (and conflict) lies in the holding below that profits may not be recovered unless "predictable at the time the merger took place" and not "unforeseeable at the time." App.8a, 9a. This mistaken requirement directly conflicts with the First Circuit's decision in *Janigan*, *supra*, 344 F.2d 781, 786, expressly holding that "future accretions not foreseeable at the time of the transfer even on the true facts" are nonetheless recoverable because "the defendant actually made the profit. . . ." The holding in *Janigan* was adopted by this Court in *Ute* as authoritative on recovery of defendants' profit.

For purposes of illustration (and without waiving petitioner's right to seek additional amounts should this Petition be granted), we refer only to the damages based on post-merger earnings and profits which are readily calculable from the opinion below, $7,146,856.

By its examination of defendants' own records, the court below made the following earnings computations for the period from 1963-72: (A) The Autolite division earnings were $122,501,632. (B) The Mergenthaler division earnings were $58,827,595 (App.7a). From these two basic computations damages are readily determinable: the total Eltra earnings (C) equal (A) + (B) or $181,329,227. The plaintiffs' minority share in Autolite's earnings (45.8% of (A)) is $56,105,747. The Autolite minority's share in Eltra's earnings (27% of (C)) is $48,958,891.[1] The difference is $7,146,856.[2] It plainly

[1] Actually the Autolite minority share in Eltra was less than 27% because much of the preferred stock was converted under punitive conversion rates and some not converted at all.

[2] The sole deduction from the $7,146,856 is the difference between the $1.40 dividends received by plaintiffs on their Eltra preferred and the dividends received by Mergenthaler

(Footnote continued on following page)

and unequivocally represents a reduction in the earnings of the plaintiffs as a direct result of the merger as well as a profit to or unjust enrichment of defendants.

This $7 million is but the beginning of defendants' profits. From 1963 to 1972 Eltra transferred out (the "transfers out" or "intra-corporate" transfers) of the Autolite division at least $103,000,000 (PX's 13-22). This sum earned for Eltra many millions of which 45.8% was a gain to defendants and a loss to plaintiffs.

The court below confused the claim for profits of the Autolite division itself and the claim for earnings on the transfers out. As to the latter, the court below said that plaintiffs "could not be injured by intra-corporate transfers of assets." (App.6a) The court was wrong on several counts.[1] But assuming *arguendo* that the court below was correct in denying relief based on "intra-corporate transfers," the $7 million *in no way* depends on such transfers. Rather it is based squarely on the mandate of this Court in *Mills* allowing plaintiffs to recover for the "reduction of [their] earnings" as a result of the merger. Plaintiffs' 27% share in Eltra's 1963-72 earnings is $7 million less than the 45.8% share they would have had in the Autolite 1963-72 earnings. They suffered this loss wholly apart from their loss on the earnings on the transfers out.

To deny post-merger earnings recovery, the court of appeals made other errors. Contrary to the opinion below (App.8a), the district court did *not* find that there

[2] *continued*
stockholders. These were $1.00 in 1963, $1.37 in 1964. After that they exceeded $1.40. Thus, the maximum deduction is $430,512 computed as follows: 1963: 1,001,194 shares at $.40 = $400,477 plus 1964: 1,001,194 shares at $.03 = $30,035 = $430,512.

[1] (1) These "intra-corporate transfers" could not have been made but for (and indeed were the object of) the illegal merger; otherwise they could only be dividends that would have to be shared with the Autolite minority. (2) $18 million of the transfers out were *not* "intra-corporate" but were sales of Hiller's assets to a *third party*. This makes *Gerstle*, *supra*, again directly in point and in conflict.

was a commingling of the assets and operations (App.53a-57a). Rather, the district court stated that plaintiffs were "able to trace. . .the assets. . .which were expressly reported in. . .Eltra's Consolidating Balance Sheets and Consolidating Statements of Net Income." App.54a. The only "assets" the district court said that plaintiffs "could not trace" were the "quality of management and the benefits of synergy," (*Ibid*), but even then the district court did not find that these intangibles constituted commingling of the operations.[1]

In all events, as a matter of law, under this Court's mandate in *Mills*, 386 U.S. 388-9, "quality of management" and "synergy" are not "assets" whose commingling could make it "impossible" to ascertain direct injury. Otherwise this Court's test for direct injury would be a nullity since in every merger or acquisition some changes in management will occur and frequently there may be a claim of "synergism."[2] The decision below is also in conflict with the First, Third and Eighth Circuits which have rejected the "changed management" concept in the ascertainment of damages. *Janigan*, *supra*, 344 F.2d 781, 787 (CA 1). *Rochez Bros.*,

[1] That there was no commingling is further evidenced by the *court of appeals'* ability to find from "Eltra's financial records" the precise amount of the post-merger earnings of the Autolite and Mergenthaler divisions of Eltra. App.7a. The proxy statement represented that there would be no commingling: "Operations of the two merging companies will not be materially affected; the Mergenthaler and Electric Autolite operations will each function as independent units of Eltra Corporation" (PX 1, pp.1-2).

[2] Synergy is commonly defined as 2 + 2 = 5 (Tr.1126). The district court did not expressly find any "synergy" here. The court of appeals defined "synergism" in terms of the rise in market price for *one* month following the merger in ostensible reliance upon *Fair Shares* (App.17a-19a). But the court's illustration (*Ibid*) is not based on anything found in *Fair Shares* which undermines reliance on market prices (*supra*, p. 12-3, 15-6). Further, even if there were synergistic benefits in the merger, defendants, as wrongdoers, are not permitted to share in them. *Fair Shares*, which concerns *lawful* mergers, is not to the contrary.

supra, 491 F.2d 402, 412 (CA 3); and *Myzel v. Fields*, 386 F.2d 718, 747 (CA 8, 1967).

Ironically, the court below dismisses concrete "financial" criteria, such as "earnings and book value," to avoid making an "abstract judgment" on fairness (App.16a, 17a) and then uses ethereal concepts of "synergy" and "quality of management" to defeat direct and concrete financial statement proof of post-merger injury to plaintiffs (App.8a).

In sum, the court of appeals' basis for denying recovery on post-merger earnings is bottomed on an erroneous legal requirement of unfairness, the assumption of findings that were not made, a definition of assets that is erroneous as a matter of law, and by giving, contrary to *Bigelow v. RKO Pictures*, 327 U.S. 251, 265 (1946); *Exercycle of Michigan, Inc. v. Wayson*, 341 F.2d 335, 337 (CA 7, 1965); *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285, 293 (CA 7, 1967); and *Gerstle, supra*, 332 F.Supp. 644, 647, the benefit of every ambiguity and advantage of the unlawful merger to the wrongdoer. The law is the reverse and requires, we respectfully submit, reversal.

III. THE ABSOLUTE DENIAL OF FEES AND EXPENSES INCURRED AFTER THE MANDATE OF THIS COURT CONFLICTS WITH THAT MANDATE.

The court of appeals ruled flatly that because no damages would be awarded to Autolite upon its reversal of the district court judgment, there could be absolutely no reimbursement for litigating expenses incurred after liability was adjudged by this Court. App.19a-21a. This ruling, made as a matter of law without hearing on the issue, stands in direct disobedience to this Court's mandate.

> "[*R*]*egardless of the relief granted*, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute." 396 U.S. at 396.
>
> "The fact that this suit has not produced, and may never produce, a monetary recovery from which the fees could be paid *does not preclude* an award based on this rationale." 396 U.S. at 392.
>
> "[T]he question of reimbursement for future expenses should be resolved in the first instance by the lower courts after the issue of relief has been litigated and a *record has been established* concerning the need for a further award." 396 U.S. at 390, n.13.
>
> "Whether petitioners are successful in showing a need for significant relief *may be a factor* in determining whether a further award should later be made." 396 U.S. at 396.

This one "factor," under this Court's directions, is neither a bar to an award nor dispositive of the question. In disregarding this direction, the court below relied mistakenly upon "the general American rule that a litigant must pay his own fees and expenses," App. 21a, as restated in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). But no such "fee-shifting" to the opposing party is at issue here. As this Court made clear, the effect of an award here "is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." 396 U.S., 396-97. The *Alyeska* opinion makes the same distinction, noting that the congressional policy there controlling " 'is intended to regulate only those fees and costs which are strictly chargeable between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client. . . .' " 421 U.S., 257 n.30.[1]

[1] If *Alyeska* were construed to forbid charging Eltra, as Autolite's successor, with Autolite's litigating expenses, the rule would equally forbid charging Eltra, as *Mergenthaler's* successor, with Mergenthaler's litigating expenses, as the court below allows. When the opposing corporate parties to the litigation have been unlawfully merged, there is no escape from the necessity of paying the lawyers for both sides from the funds of the illegal combination.

Autolite is the real party in interest as plaintiff here, and unlike a class suit, no common fund of damages is necessary to allow an order of reimbursement from the real client "in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor." 396 U.S., 394.

Where, as here, the corporation represented has been finally adjudicated to be entitled to whatever relief may be appropriate, it would constitute a flagrant breach of fiduciary duty for the corporate managers to fail or refuse to pursue the corporate right. When the corporation itself is disabled from suing by an unlawful merger, to deny litigating expenses for the further prosecution of the claim derivatively would allow the defendant to acquire absolute immunity by the very commission of the violation of federal law. In these special circumstances, the ruling that the derivative plaintiff fairly and adequately represents the corporation is tantamount to the appointment of a guardian *ad litem* or a receiver for this specific claim. Legal services are not valueless simply because ultimately they do not succeed, and here there were more than reasonable grounds for believing that significant relief would be obtained, as the decisions of the district court, the other circuits, and this Court demonstrate.

CONCLUSION

For the above reasons, petitioner respectfully requests that this Court grant a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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